2002

State of Utah v. Angie Brake : Brief of Petitioner

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Respondent, vs. ANGIE BRAKE, Defendant/Petitioner.	:	Case No. 20020594-SC

BRIEF OF PETITIONER ON CERTIORARI REVIEW

APPEAL OF THE UTAH COURT OF APPEALS' AFFIRMANCE OF BRAKE'S CONVICTION OF ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE, A CLASS A MISDEMEANOR

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JURISDICTION OF THE UTAH SUPREME COURT

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated §§ 78-2-2(3)(a) and (5). The decision of the Court of Appeals is found as follows: *State v. Brake*, 2002 UT App 190, 51 P.3d 31, *cert. granted*, 59 P.3d 602.

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the Court of Appeals erred in its conclusion that the search of Brake's vehicle was justified for reasons of officer safety? On certiorari, this Court reviews the decisions of the Court of Appeals for correctness and affords no deference to its conclusions. *State v. James*, 2000 UT 80 at ¶ 8, 13 P.3d 576.

CONTROLLING STATUTORY PROVISIONS

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Nature of the Case

Angie Brake appeals from the decision of the Court of Appeals affirming her conviction in Fourth District Court for attempted possession of a controlled substance, a class A misdemeanor.

B. Trial Court Proceedings and Disposition

Angie Brake was charged by information filed in Fourth District Court on February 9, 2000, with possession of cocaine, a third degree felony, in violation of Utah Code Annotated § 58-37-8(2)(a)(i); and possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Annotated § 58-37a-5(a) (R. 4).

On July 5, 2000, Brake filed a Motion to Suppress Evidence on grounds that the search of her vehicle constituted an illegal warrantless search under the Fourth Amendment to the United States Constitution (R. 29-40). On August 7, 2000, a suppression hearing was held before Judge Davis (R. 41-42). On October 10, 2000, Judge Lynn W. Davis denied Brake's Motion to Suppress in a signed memorandum decision (R. 50-64).

On December 4, 2000, Brake entered a plea of "guilty" to attempted possession of a controlled substance, a class A misdemeanor, conditioned upon her right to appeal the denial of her motion to suppress (R. 73-74, 78).

On January 29, 2001, Brake was sentenced to thirty-days in the Utah County Jail, ordered to pay a fine in the amount of $850.00, and placed on supervised probation for a period of twenty-four months (R. 86-88, 104).

Brake appealed her conviction to the Utah Court of Appeals (Case No. 20010204-CA). The Court of Appeals affirmed her conviction on May 31, 2002. *State v. Brake*, 2002 UT App 190, 51 P.3d 31.

Brake petitioned this Court for a writ of certiorari. This Court granted the petition on October 23, 2002. *State v. Brake*, 59 P.3d 602.

STATEMENT OF RELEVANT FACTS

On January 29, 2000, at approximately 11:45 p.m., Neil Castleberry, a sergeant with the Utah County Sheriff's Office, was patrolling in the area of West Geneva Road when he observed two vehicles--a green Nissan car and a white Chevy truck--in a small pullout between the road and the lake (R. 102 at 14-15). Castleberry pulled in behind the vehicles "to determine whether or not they needed assistance" (R. 102 at 15, 30). Castleberry testified that the engine to the truck was running, but that he did not know if the green Nissan's engine was on (R. 102 at 30). *Brake*, 2002 UT App 190 at ¶2. In addition, nothing in the record suggests that the vehicles were either illegally parked or in need of assistance. 2002 UT App 190 at ¶28 (Orme, j. dissenting).

Castleberry first approached the driver's side window of the green car and spoke with an individual in the driver's seat after the driver had rolled the window down (R. 102 at 15-16, 30). The individual in the driver's seat was a young female (R. 102 at 31). Castleberry asked the vehicle's occupants what they were doing and was informed that

they were sitting and talking (R. 102 at 31). Castleberry then asked the female in the driver's seat for identification and learned that she was fifteen years old and that she had not been driving the vehicle (R. 102 at 31). Castleberry was informed that the owner of the vehicle was sitting in the back seat (R. 102 at 16). *Brake*, 2002 UT App 190 at ¶3.

Castleberry then tried to look in the vehicle but the windows were fogged (R. 102 at 16). Although Castleberry indicated that it was "difficult" for him to see, he testified that he could see "two individuals in the back seat" (R. 102 at 16).

Castleberry then went to the driver's side rear, but could not see through the window and so he "opened the door to be able to speak with the passenger" (R. 102 at 16, 32). When Castleberry opened the car door, he encountered the appellant, Angie Brake (R. 102 at 16). Castleberry inquired of Brake as to whether she was the owner of the vehicle and why a fifteen-year old was sitting in the driver's seat (R. 102 at 17, 33). Brake informed Castleberry that she was the owner of the vehicle, that the occupants were from San Pete County, and that she had driven the vehicle to its present location and that the fifteen-year old sat in the driver's seat after their arrival (R. 102 at 17, 33).

Castleberry asked Brake for identification (R. 102 at 33). Brake replied that her identification was in her purse and she pointed to the front seat and she offered to reach forward and retrieve it (R. 102 at 17, 34-35). Castleberry did not want Brake to retrieve it for officer safety reasons so he went around the rear of the vehicle and opened the front door on the passenger side "to retriever her purse so that [he] could hand it to her, make sure that there weren't any weapons" (R. 102 at 17-18, 35-36). *Brake*, 2002 UT App 190 at ¶5.

Once Castleberry opened the front door, he reached in and retrieved a purse (R. 102 at 18). As he reached for the purse, he "noticed a small white bindle containing

white powdery substance sitting adjacent to the purse on the front seat" toward the console of the vehicle (R. 102 at 18, 19). Castleberry admitted that he had to get into the vehicle to get the purse (R. 102 at 36). *Id.*

Castleberry questioned the occupants as to ownership of the cocaine but received no response (R. 102 at 37). Castleberry then asked the occupants to whom the purse belonged and was informed that it belonged to Lilly, who was sitting in the white truck (R. 102 at 38). Castleberry then picked up the purse and the cocaine and walked over to the truck (R. 102 at 43). Castleberry testified that he approached the truck because he did not know its occupants and was concerned for his safety (R. 102 at 44). *Brake*, 2002 UT App 190 at ¶6.

When he got to the truck, Castleberry opened the door and asked the occupant if she was "Lilly" (R. 102 at 43). He then had Lilly exit the truck and asked her if the cocaine belonged to her (R. 102 at 45). Castleberry also field tested the bindle and it tested postively for cocaine (R. 102 at 19, 42, 43).

Ultimately Castleberry found Brake's purse somewhere in the front area of the vehicle (R. 102 at 38).

Castleberry subsequently interviewed Brake, without administering the Miranda warnings, in order to find out to whom the cocaine belonged (R. 102 at 20). Brake informed Castleberry that she did not know who owned the cocaine (R. 102 at 20). Castleberry questioned Brake further; and when he was asked by Brake what was going to happen, he told her that because she owned the vehicle, she was the responsible party and would be arrested for possession of cocaine unless someone claimed ownership of it (R. 102 at 20-21). Castleberry testified that Brake then admitted to ownership of the cocaine (R. 102 at 21). Castleberry also testified that Brake claimed ownership of some

drug paraphernalia that was found in the back window of the vehicle (R. 102 at 21). Brake later informed Castleberry that the cocaine belonged to the driver of the white truck, Juan Carlos Juarez and that everyone in both vehicles had used from that same container (R. 102 at 25, 28).

SUMMARY OF ARGUMENT

Brake asserts that Sergeant Castleberry's opening of the front passenger door to her vehicle constituted a warrantless search under the Fourth Amendment to the United States Constitution that was not minimal nor was it justified either by probable cause or as a search for weapons. Accordingly, Brake asks that this Court overturn the legal conclusion of the Court of Appeals that the warrantless search was justified on grounds of "officer safety"; and that this matter be remanded to the Fourth District Court with instructions that her plea is to be withdrawn, the evidence suppressed, and the matter dismissed.

ARGUMENT

POINT I

THE COURT OF APPEALS ERRED IN ITS CONCLUSION THAT THE SEARCH OF BRAKE'S VEHICLE WAS JUSTIFIED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Brake appealed from a conviction of attempted possession of a controlled substance, a class A misdemeanor. Prior to the entry of her conditional plea, Brake filed a motion to suppress in the trial court alleging that the search of her vehicle constituted an illegal search and seizure requiring suppression of all evidence discovered as a result of

the search. The trial court denied the motion because he concluded that the search of Brake's vehicle--the opening of the front passenger door and the subsequent entry into the vehicle to retrieve a purse--was justified for reasons of "officer safety" (R. 127 at 27-28).

The Court of Appeals affirmed the conviction on grounds of officer safety. *Brake*, 2002 UT App 190 at ¶¶24-27. Judge Orme filed a dissenting opinion. *Brake*, 2002 UT App 190 at ¶¶28-31. Brake asserts that the Court of Appeals' decision is erroneous and is in conflict with prior decisions from this Court. Accordingly, Brake requests that this Court overturn the legal conclusion of the Court of Appeals that the warrantless search was justified on grounds of "officer safety"; and that this matter be remanded to the Fourth District Court with instructions that her plea is to be withdrawn, the evidence suppressed, and the matter dismissed.

The presumptive rule under Fourth Amendment case law "relating to reasonable searches and seizures is that searches may not be conducted without a warrant supported by probable cause." *State v. James,* 2000 UT 80 at ¶9, 13 P.3d 576. While an individual has "a lesser expectation of privacy in a car than in his or her home, one does not lose the protection of the Fourth Amendment while in a vehicle." *State v. Schlosser*, 774 P.2d 1132, 1135 (Utah 1989). Nevertheless, it is this lessor expectation of privacy that has resulted in an "automobile exception" to the warrant rule which allows officers the ability to "temporarily detain a vehicle and its occupants upon reasonable suspicion of criminal activity for the purposes of conducting a limited investigation of the suspicion." *James,* 2000 UT 80 at ¶10. The detention must be "temporary and last no longer than is necessary to effectuate the purpose of the stop." *James,* 2000 UT 80 at n.2.

In addition, "owing to inherent safety concerns and the limited nature of the intrusion, officers may order the occupants of a vehicle to leave the vehicle during the

course of the investigation." *James,* 2000 UT 80 at ¶10. However, "if no arrest is made, an officer may make a warrantless search of the automobile only if there is probable cause for the search" or "if the officer has a reasonable and 'articulable suspicion that the suspect is potentially dangerous'" and "'may gain immediate control of weapons.'" *Schlosser,* 774 P.2d at 1135, 1137 (citing *United States v. Ross,* 434 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982) and quoting *Michigan v. Long,* 463 U.S. 1032, 1049, 1052-55 n. 16, 103 S.Ct. 3469, 3481, 3482-83 n.16, 77 L.Ed.2d 1201 (1983)). Moreover, the opening of a vehicle to search for physical evidence door constitutes a "search" under the Fourth Amendment. *James,* 2000 UT 80 at ¶13; *Schlosser,* 774 P.2d at 1135-36. *See also, New York v. Class,* 475 U.S. 106, 114-115, 106 S.Ct. 960, 966-67, 89 L.Ed.2d 81 (1986).

In reaching its decision to affirm the conviction on grounds that a proper search and seizure was performed, the Court of Appeals first concluded that a governmental interest exists in removing unlicensed drivers from the road and that Castleberry "having discovered an underage and unlicensed individual at the wheel of a running vehicle" was justified in requesting identification from Brake who owned the vehicle. *Brake*, 2002 UT App 190 at ¶23. However, the Court of Appeals' decision erroneously ascertained that the vehicle was running. This indication is clearly erroneous and not supported by Castleberry's testimony. Castleberry testified that the engine to the truck was running, but that he did not know if the green Nissan's engine was on (R. 102 at 30).

The Court of Appeals concluded that the search of Brake's vehicle was justified under an officer safety exception and also because the intrusion was deemed to be minimal. The Court of Appeals cited the following facts to support its conclusion: Both vehicles were running in a desolate and frequent crime area. An under-aged driver was

sitting in the driver's seat of the green Nissan. Five individuals were present in the two vehicles. The windows were fogged and Castleberry was unable to identify the passengers in the rear seat of the Nissan. The purse at issue was in a dark area outside Castleberry's control. *Brake*, 2002 UT App 190 at ¶25.

As established above, the Court of Appeals' finding that the Nissan's engine was running is clearly erroneous and not supported by Castleberry's testimony. In addition, the majority opinion omits several important facts also present in this case. One, although there were five individuals present in the two vehicles, Castleberry did not call for back-up until after the search of the vehicle (R. 61). If Castleberry was truly concerned for his safety, he would have called for back-up and would have taken other precautionary actions. Two, there is nothing in the record which suggests that the vehicles were either illegally parked or in need of assistance. *Brake*, 2002 UT App 190 at ¶28 (Orme, j. dissenting). Three, Castleberry expressly testified that he elected to open the vehicle's front door and retrieve the purse so that he could "make sure that there weren't any weapons" (R. 102 at 17-18, 35-36). *Brake*, 2002 UT App 190 at ¶28.

In reaching its conclusion that the intrusion was minimal and the search was justified under an officer safety exception, the Court of Appeals relied on *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960 (1986). In *Class*, the officer was allowed to open a vehicle door in order to obtain the VIN number from the vehicle, after the defendants had voluntarily exited the vehicle. *Brake*, 2002 UT App 190 at ¶¶21-22. The U.S. Supreme Court held that after applying a balancing test between the "governmental interest in highway safety served by obtaining the VIN," and the "concern for the officers' safety," the particular method of obtaining the VIN was justified. *Class*, 475 U.S. 106 at 118, 106 S. Ct. at 968.

The basis for which the U.S. Supreme Court found that the police officers were justified in opening the door of the car and moving the papers in order to retrieve the VIN of the vehicle, was because "the VIN plays an important part in the pervasive regulation by the government of the automobile. A motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished. This is especially true in the case of a driver who has committed a traffic violation." 106 S.Ct. at 965.

Furthermore the Court concluded, "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment. The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a "search."" *Id.* at 966. The Supreme Court also stated that even though the interior of an vehicle is not subject to the same expectations of privacy that exist within one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police. *Id.*

The facts in *Class* are very distinguishable from those of the present case. In the present case, the officer was not searching for a VIN of the automobile and had not pulled the automobile over for any violations of the law. The vehicle was parked legally and the officer had no reason to retrieve the VIN of the vehicle.

By basing their majority opinion on the outcome of *Class,* the Court of Appeals ignores both the distinguishing facts of this case and prior Utah case law concerning the

search of the interior of a vehicle for weapons in the course of an investigatory stop. *Brake*, 2002 UT App 190 at ¶¶28-31 (Orme, j. dissenting).

For example prior Utah cases establish that an officer may only conduct a weapons search if he "reasonably believes a suspect is dangerous and may obtain immediate control of weapons." *State v. Bradford*, 839 P.2d 866, 870 (Utah App. 1992). For such a search to be justified, however, "a reasonably prudent [person] in the circumstances [must believe] that his safety... was in danger." *State v. Roybal*, 716 P.2d 291, 293 (Utah 1986).

Brake maintains that Castleberry's warrantless search of the passenger compartment was not a minimal intrusion and that it was not supported by "reasonable and articulable suspicion" that Brake or the other occupants of the vehicle were dangerous or that there were weapons present. *State v. Schlosser,* 774 P.2d 1132, 1135, 1137-38 (Utah 1989). "An officer may search a vehicle for weapons if he has a reasonable belief that the suspect is dangerous and 'may gain immediate control of weapons.'" *Schlosser,* 774 P.2d at 1137 (quoting *Long,* 463 U.S. at 1049, 103 S.Ct. at 3481). However, "'due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.'" *Schlosser,* 774 P.2d at 1137 (quoting *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968)).

Furthermore, the Court of Appeals main opinion completely ignores this Court's prior decision in *State v. Chapman*, 921 P.2d 446 (Utah 1996). In *Chapman*, this Court held that "a weapons search was not warranted, even though the suspect was a gang member who had reputedly carried a weapon in the past, where 'nothing about the nature of the underlying offense being investigated'--i.e., parking on school property after hours--'prompted a concern for safety... [and] [n]othing defendant, did, by way of conduct,

attitude, or gesture, suggested the presence of a weapon in the vehicle.'" *Brake*, 2002 UT App 190 at ¶30 (Orme, J. dissenting) (quoting *Chapman*, 921 P.2d at 454).

In *Chapman*, the officer, upon discovering the illegally parked vehicle, pulled behind the vehicle and turned his warning lights on the defendant's vehicle. *Chapman*, 921 P.2d at 448. The officer did not see any weapons, he only had knowledge that the defendant had the reputation of carrying a weapon and that he was a known gang member. Nothing about being illegally parked in a school parking lot, by its very nature, suggested the presence of weapons and therefore this Court concluded that the officer was not justified in searching for weapons to ensure his own safety.

In this case, similarly, Brake asserts that the officer was not justified in making any search for weapons for his safety, because "nothing about a motorist possibly needing assistance, or even underage driving, by its very nature suggests the presence of weapons." *Brake*, 2002 UT App 190 at ¶31 (Orme, J. dissenting). Castleberry, the officer, testified that he originally stopped and approached Brake's vehicle to determine whether or not they needed assistance (R. 102 at 15, 30). Upon approaching the parked vehicle, Castleberry found that an underage driver was sitting in the driver's seat of the vehicle (R. 102 at 16, 31). Accordingly, Brake asserts that the officer was not justified to search even part of the interior of the vehicle for weapons while conducting his investigation of underage driving and that all evidence found as a result of the search should have been suppressed. *Id.* The officer did not see any weapons, did not observe in furtive movements or other conduct consistent with the presence of a weapon, and the officer had no reason to believe that weapons were present. *Id.*

Accordingly, Brake asks that this Court overturn the legal conclusion of the Court of Appeals that the warrantless search was justified under the Fourth Amendment on grounds that it was a minimal intrusion supported by reasons of "officer safety".

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Brake asks that this Court reverse the decision of the Court of Appeals and that this matter be remanded to the Fourth District Court with instructions that her plea is to be withdrawn, the evidence suppressed, and the matter dismissed.

RESPECTFULLY SUBMITTED this 17TH day of March, 2003.

Margaret P. Lindsay
Counsel for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 17th day of March, 2003.

ADDENDA

it is adequate because the trial court was sufficiently familiar with the case to make the determination without a precise affidavit. Each requirement is discussed in order below.

[12] ¶ 19 First, while Sieg omitted the legal basis for seeking attorney fees from his affidavit, this does not warrant reversal by itself because the parties and the judge knew the legal basis for seeking attorney fees. In *Hall v. NACM Intermountain, Inc.*, 1999 UT 97, 988 P.2d 942, the supreme court held that because both the court and counsel were aware of the legal basis for seeking attorney fees, there was no prejudice from a failure to state a legal basis in the affidavit. *See id.* at ¶ 21. In this case, the trial court and counsel knew that the Agreement provided the legal basis for attorney fees. Therefore, Sieg's omission does not warrant reversal.

¶ 20 Second, the affidavit states the number of hours the attorney spent in prosecuting the matter. Sieg details the number of hours his attorney and an associate worked on the case as well as the rate at which each billed. Therefore, Sieg's counsel complied with the second requirement of rule 4–505(1).

[13] ¶ 21 Finally, Premier argues that Sieg failed to explain the nature of the services his attorney rendered. Under Utah law, the party claiming attorney fees is required to provide the trial court with sufficient evidence to allow a determination of reasonableness. *See Cabrera v. Cottrell*, 694 P.2d 622, 624 (Utah 1985). Although the evidence Sieg produced at trial is not ideal, it is sufficient because the parties and the trial court knew that the dispositive issue in this case was whether there was adequate consideration to support a sale or exchange. The record shows that the trial court was very familiar with this issue and the quality of the work Sieg's counsel provided. Therefore, under the facts of this case and the discretion accorded to the trial court, the evidence presented was sufficient to affirm the award of attorney fees.

CONCLUSION

¶ 22 In sum, the transfer of the Property from Sieg to MJTM was not supported by consideration so as to constitute a sale or exchange. Because no sale or exchange occurred, Sieg owes no commission under the Agreement. Since Sieg has prevailed below and on appeal, he was correctly awarded attorney fees and is entitled to fees incurred on appeal. Accordingly, we affirm the trial court's decision on both issues and remand to the trial court to determine the amount of reasonable attorney fees Sieg is entitled to as a result of this appeal.

¶ 23 WE CONCUR: NORMAN H. JACKSON, Presiding Judge, and WILLIAM A. THORNE JR., Judge.

2002 UT App 190

STATE of Utah, Appellee,

v.

Angie BRAKE, Appellant.

No. 20010204–CA.

Court of Appeals of Utah.

May 31, 2002.

After denial of her motion to suppress evidence of cocaine found in vehicle, defendant pled guilty in the Fourth District Court, Provo Department, Lynn W. Davis, J., to attempted possession of a controlled substance. Defendant appealed. The Court of Appeals, Thorne, J., held that: (1) police officer's request for defendant's driver's license was justified and reasonable; (2) officer's concern for safety justified officer's warrantless entry into vehicle to retrieve purse; and (3) officer's retrieval of purse from vehicle, to extent action constituted a search, was minimally intrusive in furtherance of legitimate public safety concerns.

Affirmed.

Orme, J., dissented and filed an opinion.

1. Criminal Law ⇐1139, 1158(4)

In reviewing a motion to suppress, a trial court's factual findings are reviewed deferentially under the clearly erroneous standard, and its conclusions of law are reviewed for correctness with some discretion given to the application of the legal standards to the underlying factual findings.

2. Arrest ⇐63.5(9)

Police officer's request for driver's license of vehicle owner who was sitting in back seat of the running vehicle parked on side of road was justified and reasonable, where officer had originally asked girl in driver's seat for a valid driver's license, but girl informed officer she was too young to have a driver's license and that the vehicle owner was sitting in the back seat. U.S.C.A. Const.Amend. 4; U.C.A.1953, 41–6–165, 41–8–1(1).

3. Searches and Seizures ⇐65

Police officer's warrantless entry into vehicle to retrieve occupant's purse from front passenger seat, upon being told by occupant, who was in back seat, that her identification was in purse, was justified in light of officer's concerns for his safety, and thus constitutionally permissible; officer was unable to see into backseat due to the darkness and fogged windows, there were a total of five individuals in two vehicles that appeared to be running, officer was in a desolate and high crime area, and purse was located in dark area out of his control. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐65

To the extent that police officer's action constituted a search, officer's warrantless entry into vehicle to retrieve occupant's purse from front passenger seat, upon being told by occupant, who was in back seat, that her identification was in purse, was focused and minimally intrusive in furthering legitimate public safety concern, and thus constitutionally permissible, where officer did not root through the interior of the vehicle, did not reach into any compartments, and did not open any containers. U.S.C.A. Const. Amend. 4.

Margaret P. Lindsay, Aldrich Nelson Weight & Esplin, Provo, for Appellant.

Mark L. Shurtleff, Attorney General, and Kenneth A. Bronston, Assistant Attorney General, Salt Lake City, for Appellee.

Before Judges BENCH, ORME, and THORNE.

OPINION

THORNE, Judge.

¶ 1 Appellant Angie Brake (Brake) appeals from a conviction for Attempted Possession of a Controlled Substance, a class A misdemeanor, in violation of Utah Code Ann. § 58–37–8(2)(a)(i) (Supp.1999). We affirm.

BACKGROUND

¶ 2 On January 29, 2000, at approximately 11:45 p.m., Utah County Deputy Sheriff Neil Castleberry (Castleberry) observed two vehicles stopped in a small pullout on the side of the road west of the Geneva Steel plant. Castleberry pulled up behind the vehicles to inquire whether the occupants of either vehicle needed assistance. Because he was merely inquiring whether anyone needed assistance, Castleberry did not have his emergency lights on when he approached the vehicles. Castleberry, however, was aware that the vehicles were stopped in an area "known for frequent criminal activity."

¶ 3 Upon exiting his vehicle, Castleberry approached one of the two vehicles, a green Nissan, which he believed had the engine running. Castleberry observed a young woman in the driver's seat. He asked the woman to roll down the window, which she did, and then he asked for her driver license. The woman told Castleberry that she was fifteen years-old and that she did not have a driver license. The woman also told Castleberry that she had not been driving the vehicle. Castleberry then inquired about the vehicle's owner, and the woman told him that the vehicle's owner was sitting in the backseat.

¶ 4 Because the vehicle's windows were fogged, Castleberry was unable to see clearly into the backseat. He was able, however, to

see that two persons, a male and a female, were sitting in the backseat. Because his vision was obscured, Castleberry opened the backseat door to speak to the two persons. Brake, who was sitting in the backseat, identified herself as both the vehicle's owner and the driver. Brake told Castleberry that she and the others, including the individuals in the other vehicle, were from Sanpete County. She also told Castleberry that she had changed seats with the fifteen-year-old when they arrived at their current location.

¶ 5 Castleberry asked Brake for her identification. Brake told Castleberry that her identification was in her purse and pointed to the front passenger seat, where no one was sitting. Because the purse was located "in a dark area over which he h[ad] no control[,]" [1] Castleberry decided, for safety reasons, to retrieve the purse himself. Castleberry walked around to the passenger side of the front seat and opened the vehicle door to retrieve the purse. As Castleberry reached inside the vehicle to remove the purse, he saw, in plain view, a white bindle next to the purse near the vehicle's console.

¶ 6 Castleberry picked up the purse and asked for its owner. Someone sitting in the Nissan told Castleberry that the purse belonged to "Lilly," and that she was sitting in the other vehicle. Castleberry took the purse and the bindle over to the other vehicle. He opened the vehicle's door and asked for Lilly. Castleberry also asked the persons sitting in the vehicle if the purse belonged to Lilly. One of the two persons identified herself as Lilly and told Castleberry that she owned the purse. Lilly, however, denied owning the bindle. Castleberry had Lilly exit the vehicle and continued to question her at his patrol car. He also tested the white powdery substance contained in the bindle, which tested positive for cocaine.

¶ 7 Castleberry proceeded back to the Nissan and asked the three individuals who owned the cocaine. Castleberry received no response from them. Unable to determine who owned the cocaine, Castleberry told Brake that she would be arrested if no one claimed ownership because she owned the vehicle. Brake then admitted that the cocaine belonged to her and that she and the others had used the cocaine throughout the evening. Castleberry arrested Brake and called for backup. A subsequent search of the Nissan uncovered drug paraphernalia.

¶ 8 Brake was bound over on charges of possessing a controlled substance and unlawful possession of drug paraphernalia. Brake subsequently filed a motion to suppress both the cocaine and her incriminating statements.[2] The trial court denied Brake's Motion as it pertained to the admissibility of the cocaine and granted her Motion pertaining to her incriminating statements.

¶ 9 In denying that portion of Brake's Motion to Suppress, the trial court concluded that opening the vehicle's front passenger door to retrieve the purse was justifiable under the officer safety exception to the Fourth Amendment's warrant requirement. The trial court relied upon the following facts in reaching its decision:

1. [Castleberry] was alone on patrol and had not yet called for backup.
2. It was late at night; it was dark and none of the occupants lived in Utah County.
3. The road is located in a remote area of Utah County and ... Castleberry described it as a "deserted road."
4. There were two vehicles at the site with occupants in each (three occupants in the subject vehicle and two occupants in the pickup truck which was parked contiguous).
5. This was an area of frequent criminal activity.
6. [Castleberry's] vision was severely restricted because of the darkness and the fact that all of the windows were fogged up.
7. The other vehicle was running and ... Castleberry testified he believed that the subject vehicle had the engine on with a fifteen-year-old unlicensed girl behind the wheel and two other passengers in the back seat.

1. This quote comes from the trial court's Ruling on Motion to Suppress, ¶ 10.

2. Castleberry had questioned Brake before administering her *Miranda* warning.

¶ 10 As a result of the trial court's decision, Brake pleaded guilty to attempted possession of a controlled substance. She conditioned her plea on the right to appeal the trial court's partial denial of her Motion to Suppress. This appeal followed.

ISSUE AND STANDARD OF REVIEW

[1] ¶ 11 Brake argues the trial court erred by denying that portion of her Motion to Suppress alleging that by opening the passenger door to obtain the purse, Castleberry's actions constituted an impermissible warrantless search. In reviewing a motion to suppress, "[a] trial court's factual findings are reviewed deferentially under the clearly erroneous standard, and its conclusions of law are reviewed for correctness with some discretion given to the application of the legal standards to the underlying factual findings." *State v. Loya*, 2001 UT App 3, ¶ 6, 18 P.3d 1116.

ANALYSIS

[2–4] ¶ 12 Brake argues that Castleberry conducted an impermissible warrantless search when he opened the Nissan's front passenger door to retrieve the purse, and therefore, violated her Fourth Amendment right against unreasonable searches and seizures. To support her argument, Brake relies upon *State v. Schlosser*, 774 P.2d 1132 (Utah 1989).

¶ 13 In *Schlosser*, a Utah Highway Patrol trooper stopped a vehicle for a traffic violation. *See id.* at 1133. As the vehicle pulled to the side of the road, the trooper observed the defendant, a passenger in the vehicle, "bending forward, acting fidgety, turning to the left and to the right, and turning back to look at the [trooper]." *Id.* The movement drew the trooper's attention.

¶ 14 After the vehicle stopped, the driver exited the vehicle, approached the trooper, and presented the trooper his license and registration. *See id.* at 1133–34. All the while, the trooper noticed that the defendant "continued to move about the cab of the truck." *Id.* at 1134. As a result of the defendant's behavior, the trooper concluded that the defendant "was trying to hide something." *Id.* The trooper approached the passenger side of the vehicle, tapped on the window, and opened the door. *See id.* The trooper "scanned the interior of the truck for contraband and saw a bag of marijuana in the passenger door pocket." *Id.* The trooper also "smelled marijuana smoke." *Id.* The trooper arrested both the defendant and the driver.

¶ 15 The defendant moved to suppress the marijuana.[3] The trial court granted the defendant's motion and suppressed "all the evidence seized." *Id.* The trial court concluded that the trooper "acted on 'a mere suspicion that the defendant . . was engaged in criminal activity,' and had no legal basis for the search and seizure." *Id.* (citation omitted). The State appealed.

¶ 16 The Utah Supreme Court affirmed the trial court's ruling. *See id.* at 1139. The court concluded that the trooper's opening the vehicle door was a "search." *Id.* at 1135. The court also concluded that the search was unlawful. *See id.* at 1135–36. The court reasoned that

> [the trooper's] testimony established that his opening the car door exceeded the legitimate objectives of a traffic stop. The [trooper's] "clear initial objective" in opening the car door was to see whether [the defendant] was "hiding something." However, without probable cause to justify it, that act clearly exceeded the lawful scope of a legitimate government interest.

Id.

¶ 17 Finally, the court explained that the trooper "cited no safety concerns as the basis for his actions; he sought only to investigate the possibility that defendants were engaged in illegal activity." *Id.* at 1137. Because of the safety concerns in the present case, we conclude that *Schlosser* is inapplicable to the present matter.

¶ 18 The facts and the reasoning set forth in *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986), are applicable to the present matter. In *Class*, the United

3. The defendant also moved to suppress drug paraphernalia and two firearms, which the trooper discovered while searching the vehicle *See id.*

States Supreme Court held that a minimally intrusive warrantless search was justified in light of the Fourth Amendment protection against unreasonable searches when balanced against concerns for police officer safety. *See id.* at 117–18, 106 S.Ct. at 967–68.

¶ 19 In *Class*, police officers stopped the defendant for two traffic violations. *See id.* at 107–08, 106 S.Ct. at 962. Upon stopping his vehicle, the defendant exited and approached one of the two officers conducting the stop. *See id.* at 108, 106 S.Ct. at 963. While one of the officers spoke with the defendant, the other officer proceeded to the defendant's vehicle and opened the door in an effort to locate the VIN number. *See id.* The officer was unable to locate the VIN number on the doorjamb, and, subsequently, he reached into the vehicle's interior to remove some papers that obscured the area of the dashboard where the VIN number was also located. *See id.* Upon doing so, the officer saw a gun protruding from underneath the driver's seat. *See id.* The officers arrested the defendant. *See id.*

¶ 20 The defendant filed a motion to suppress the gun, which the trial court denied. *See id.* Ultimately, the New York Court of Appeals reversed the trial court, concluding that the officer's intrusion into the vehicle was a search that was not justified because the facts of the case " 'reveal no reason for the officer to suspect other criminal activity [besides the traffic infractions] or to protect his own safety.' " *Id.* at 109, 106 S.Ct. at 963 (quoting *State v. Class*, 63 N.Y.2d 491, 483 N.Y.S.2d 181, 472 N.E.2d 1009, 1012 (1984)).

¶ 21 The United States Supreme Court reversed. The Court determined that "the governmental interest in highway safety served by obtaining the VIN is of the first order, and the particular method of obtaining the VIN here was justified by a concern for the officers' safety." *Id.* at 118, 106 S.Ct. at 968. The Court reasoned that "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective." *Id.*

¶ 22 As a result, the Court held that

> this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations. Any other conclusion would expose police officers to potentially grave risks without significantly reducing the intrusiveness of the ultimate conduct—viewing the VIN—which, as we have said, the officers were entitled to do as part of an undoubtedly justified traffic stop.

Id. at 119, 106 S.Ct. at 968.

¶ 23 The Utah Supreme Court has held that a governmental interest exists in "removing unlicensed drivers from the road for public safety reasons." *State v. Harmon*, 910 P.2d 1196, 1203 (Utah 1995) (addressing the public safety concerns of individuals driving with a suspended license). Moreover, Utah Code Ann. § 41–8–1(1) (1998) prohibits a person under sixteen years old from operating a motor vehicle. And, Utah Code Ann. § 41–6–165 (1998) makes it a crime for a vehicle's owner to allow an underage and unlicensed person to operate that vehicle.[4] Having discovered an underage and unlicensed individual at the wheel of a running vehicle, we conclude that it was both justifiable and reasonable for Castleberry to request from Brake, the vehicle's owner, her driver license "in light of the governmental interest in removing unlicensed drivers from the road for public safety reasons." *Harmon*, 910 P.2d at 1203.

¶ 24 Our conclusion that Castleberry was both justified and reasonable in his request to Brake, also leads this court to conclude that the United States Supreme Court's reasoning in *Class*, concerning police officer safety, is applicable in this matter. Specifically, in the situation facing Castleberry, he was justified in his decision to retrieve the purse.

¶ 25 Castleberry approached two vehicles, both of which he believed to be running, in a desolate and frequent crime area. After he had encountered the Nissan's occupants,

4. Utah Code Ann § 41–6–165 (1998), states "It is unlawful for the owner of any vehicle knowingly to permit the operation of such vehicle upon a highway in any manner contrary to law." *Id*

Castleberry discovered that (1) the individual in the Nissan's driver's seat was fifteen years-old and did not possess a driver license; (2) due to the darkness and fogged up windows, he was unable to see clearly into the Nissan's backseat to identify the passengers sitting in the backseat; (3) the individuals in both vehicles totaled five; and (4) the purse was located in a dark area out of his control.

¶ 26 When Castleberry set out to retrieve the purse, "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective." *Class*, 475 U.S. at 118, 106 S.Ct. at 968. As in *Class*, Castleberry did not "root about the interior of [Brake's vehicle]." *Id.* Further, "[Castleberry] did not reach into any compartments or open any containers." *Id.* Ultimately, Castleberry's "safety [and a legitimate public safety concern] w[ere] served by the [minimal] governmental intrusion." *Id.* at 117, 106 S.Ct. at 968. The trial court's decision to deny Brake's Motion to Suppress, as it relates to Castleberry's retrieval of the purse, is therefore affirmed.[5]

¶ 27 I CONCUR: RUSSELL W. BENCH, Judge.

ORME, Judge (dissenting).

¶ 28 Two facts, omitted from the main opinion, bear mention. First, the officer ostensibly set about to see if the occupants of the lawfully parked vehicles needed assistance even though nothing in the record suggests a trunk or hood was open, jacks and a spare tire were positioned by either vehicle, or emergency flashers were activated. Second, the officer expressly testified that he elected to open the one vehicle's front door and retrieve the purse so that he could "make sure that there weren't any weapons."[1]

¶ 29 Utah law concerning the search of the interior of a vehicle for weapons, in the course of an investigatory stop, is clear. As explained in a series of cases, none of which are cited in the main opinion, an officer may conduct a weapons search only if he "reasonably believes a suspect is dangerous and may obtain immediate control of weapons." *State v. Bradford*, 839 P.2d 866, 870 (Utah Ct.App. 1992). This regimen also applies to traffic stops, even though they are regarded as potentially dangerous. *See id.* at 869. Such a search is justified only if " 'a reasonably prudent [person] in the circumstances would *be warranted in the belief that his safety* . . . was in danger.' " *State v. Roybal*, 716 P.2d 291, 293 (Utah 1986) (quoting *Terry v Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968)). And such a belief can originate in the officer's contemporaneous observations—either of a weapon or of some furtive movements consistent with retrieval of a weapon—or in the inherent nature of the underlying offense. *See State v. Chapman*, 921 P.2d 446, 454 (Utah 1996).

¶ 30 Thus, in *Bradford*, a weapons search was permitted not because of a generalized safety concern or because the intrusion was deemed slight, but because the officer noticed the driver pull a black bag toward the front of the car from an area where the

5. Contrary to the dissent's conclusion, Castleberry neither requested nor conducted a weapons search of either the vehicle or the purse. Castleberry merely retrieved the purse from a dark area within the vehicle that was outside of his immediate control and sought to convey the purse to its owner. Castleberry did not search the purse, and therefore, as we stated above, to the extent that Castleberry's action constituted a search it was focused in its objective and no more intrusive than necessary. *See New York v. Class*, 475 U.S. at 118, 106 S.Ct. at 968. Ultimately, Castleberry's action helped to ensure not only his safety, but also the safety of those in the vehicle.

1. As pointed out in footnote 5 of the main opinion, the officer's purpose—to "make sure that there weren't any weapons"—was not disclosed to the occupants of the vehicle. Contrary to the claim in that footnote, however, the officer candidly admitted this was his purpose in entering the vehicle and retrieving the purse himself—this is not something I have created from whole cloth. The officer satisfied himself that there were no weapons in the area where he located the purse. It is true he did not search the purse, but at that point in time he had seen the bundle and the focus of the encounter had therefore dramatically changed. Moreover, the record does not disclose the size, shape, or weight of the purse. It is entirely possible the officer did not search the purse only because its size, shape, and weight were inconsistent with the possibility it contained a firearm.

officer earlier observed a rifle. *See* 839 P.2d at 871. And in *State v. Strickling*, 844 P.2d 979 (Utah Ct.App.1992), a weapons search was upheld where a vehicle's occupants were suspected of involvement in a burglary. *See id.* at 984 (noting " '[i]t is reasonable for an officer to believe that a burglar may be armed with weapons' ") (quoting *State v. Carter*, 707 P.2d 656, 660 (Utah 1985)). Conversely, in reversing this court in *Chapman*, the Utah Supreme Court held a weapons search was not warranted, even though the suspect was a gang member who had reputedly carried a weapon in the past, where " '[n]othing about the nature of the underlying offense being investigated' "—i.e., parking on school property after hours— " 'prompted a concern for safety ... [and][n]othing defendant did, by way of conduct, attitude, or gesture, suggested the presence of a weapon in the vehicle.' " *State v. Chapman*, 921 P.2d 446, 454 (Utah 1996) (quoting *State v. Chapman*, 841 P.2d 725, 732 (Utah Ct.App.1992) (Orme, J., dissenting)).

¶ 31 Applying the correct legal doctrine to this case, rather than the jurisprudence which has developed concerning law enforcement's entitlement to ascertain a vehicle identification number, leads to the opposite result from that reached by the majority. The officer did not see any weapons, nor does the record suggest he observed any furtive movements or other conduct consistent with the retrieval or presence of a weapon. And nothing about a motorist possibly needing assistance, or even underage driving, by its very nature suggests the presence of weapons. It follows that the officer was not entitled to search even part of the interior of the vehicle for weapons while conducting his investigation of possible underage driving, and that all evidence found as a result of that search should have been suppressed.

2002 UT App 195

STATE of Utah, Plaintiff and Appellee,

v.

Michael BUNTING, Defendant and Appellant.

No. 20010016-CA.

Court of Appeals of Utah.

June 6, 2002.

Defendant pled guilty in the Third District Court, Salt Lake Department, Timothy R. Hanson, J., to child abuse homicide. Defendant appealed. The Court of Appeals, Billings, Associate P.J., held that: (1) misrepresentations by detectives during interview with defendant were not sufficient to overcome defendant's will; (2) statements by detective during interview with defendant did not constitute threats or suggestions of leniency which had overcome defendant's free to have induced defendant into making incriminating statements; (3) detectives, in conducting interview with defendant, did not employ "false friend technique" to induce defendant to make incriminating statements; and (4) tactics by detectives during interview with defendant did not exploit any known mental or psychological condition of defendant to induce incriminating statements.

Affirmed.

1. Criminal Law ⇐1158(4)

In reviewing the denial of defendant's motion to suppress, an appellate court recites the facts in a light most favorable to the trial court's findings.

2. Criminal Law ⇐1134(3)

The ultimate determination of voluntariness of incriminating statements is a legal question that an appellate court reviews for correctness. U.S.C.A. Const.Amends. 5, 14.

3. Criminal Law ⇐1158(1)

An appellate court sets aside a trial court's factual findings only if they are clearly erroneous.

FILED 10-10-00
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. ANGIE M BRAKE Defendant.	**RULING ON MOTION TO SUPPRESS** CASE NO. 001400514 DATE: OCTOBER 10, 2000 JUDGE: LYNN W. DAVIS CLERK: SGJ

Defendant, Angie M. Brake, filed her Motion to Suppress on July 5, 2000. A suppression hearing was conducted on August 7, 2000. Defendant was present and was represented by Mr. Paul Dewitt, Esq. Mr. David Clark, Deputy Utah County Attorney, represented the State of Utah.

The matter was taken under advisement and the State of Utah was given time to file a memorandum. The State filed its Motion and Memorandum in Opposition to the Defendant's Motion to Suppress on August 15, 2000.

The Court, having considered the testimony at the hearing, arguments of counsel, and legal memoranda, now finds and rules as follows:

1. On January 29, 2000, Deputy Castleberry of the Utah County Sheriff's Office was on patrol alone in an isolated area of Utah County on a road which goes along Utah Lake by the Lindon Boat Harbor and which is directly west of the Geneva Steel Plant.

2. Officer Castleberry testified that this is an area that "has been known to frequent criminal activity." Transcript at page 33.

3. It was a dark, cold winter night at approximately 11:45 p.m. when Officer Castleberry spotted two vehicles off the road. Officer Castleberry stopped to investigate and "to determine whether or not they needed assistance. . ." Transcript at page 15. One vehicle was a white pickup truck and the other was a Nissan passenger vehicle.

4. He noted that both vehicles appeared to have occupants. The pickup truck was running and he thought the Nissan vehicle was probably running.

5. The windows of the vehicle were fogged, making visibility inside the vehicle impossible. Castleberry at 16 (15-20).

6. A fifteen-year-old girl was in the driver's seat of the vehicle while defendant was sitting in the rear seat with another passenger who had difficulty in understanding or communicating in English. Castleberry at 17 (1-15).

7. Because it was past curfew, and a juvenile was present who was not licensed to drive the vehicle, Deputy Castleberry sought identification from defendant who claimed to be the owner of the vehicle. Castleberry at 17 (20).

8. Deputy Castleberry testified that his intentions were to warn the occupants of the curfew violation and in this case, "I would tell them they were only 15 minutes past curfew, it's time to be headed for home." But during the conversation he then learned that all the occupants were from San Pete County. He wanted further to check to see if anyone was licensed to drive the vehicle. Castleberry at 37 (16-18).

9. After talking with the juvenile in the driver's seat, Deputy Castleberry then opened the rear door on the driver's side of the vehicle to speak with defendant because he was unable to see her through the window or from his vantage at the driver's open window.

10. Officer Castleberry asked defendant for identification. Defendant indicated or pointed to a purse in the front passenger seat. Officer Castleberry testified that he decided to retrieve the license because it was located in a dark area over which he had no control. Castleberry at 17 (6-7).

11. Officer Castleberry, for safety reasons, then retrieved the purse himself. "I opened the door to reach in to retrieve what I believed to be her purse. . . As I reached for the purse, I noticed a small white bindle containing a white powdery substance sitting adjacent to the purse on the front seat." The bindle was in plain view on the passenger seat between the purse

and the console. The purse on the front seat did not belong to the defendant. While her driver's license was ultimately obtained, it was not obtained from the purse on the front seat. Castleberry at 18 (18-22).

12. Defendant's purse, containing her license, was located later by Officer Castleberry in the front passenger area of the vehicle. He could not recall whether it was in the glove compartment or the floor area, but was not on the front seat.

13. Subsequent to entering the vehicle, finding the evidence, and seizing the drugs, Deputy Castleberry spoke with defendant regarding the alleged drugs he found. That questioning was conducted without giving defendant her Miranda warnings. Castleberry at 42 (9-11).

14. Deputy Castleberry questioned defendant after finding the illegal drugs. He further testified that (1) he planned on arresting someone for the illegal drugs; (2) that person would be defendant if no one else claimed the drugs; and (3) that defendant was not free to leave during questioning. Castleberry at 41 (11-25) - 42 (1-8).

15. Specifically, during the questioning of defendant, Miss Brake asked the deputy what was going to happen. Deputy Castleberry told her, "I said, if I cannot determine who owns the cocaine at this point inasmuch as you are the owner of the vehicle, you are responsible for what is inside your vehicle, that I would arrest you for possession of cocaine if no one came forth and claimed possession of it." Castleberry at 20 (21-25) - 21 (1-5).

16. Officer Castleberry had called for backup and Officer Chipman arrived. He conducted a further search of the Nissan as Officer Castleberry continued his investigation and questioning of the occupants of both vehicles.

17. Officer Chipman located, in plain view, a tin canister that had a straw in it and a razor blade. These items were located "up against the back window" of the Nissan near where the defendant was sitting.

II.

ISSUES

Defendant moves to suppress the evidence in this case because the search of the subject vehicle was conducted without a warrant and because statements by the defendant to Officer Castleberry were made without a Miranda warning.

ISSUE NO. 1

Was Sgt. Castleberry's warrantless search of the defendant's vehicle, which took place when the officer opened the front passenger door of the defendant's vehicle, permissible and justified?

The prosecution bears the burden of establishing a constitutionally recognized exception to the warrant requirement to substantiate a search. State v Arroy, 796 P.2d 684 (Utah 1990). State v Shoulderblade, 905 P. 2d 289 (Utah, 1995). The State of Utah relies upon a Washington Court of Appeals case, State v Grinier, 659 P.2d 550 (Wash. App. 1983), which stands for the proposition that "if circumstances either place the police in danger or create a risk of loss or destruction of evidence, a warrantless search is permissible." Id. at 552 (Emphasis added.) If this is a paramount rule of law, one would certainly think there would be a case out of this jurisdiction, and some case other than a Washington intermediate court of appeals to announce it.

This Court has carefully reviewed the testimony regarding Deputy Castleberry's decision to retrieve defendant's driver's license as contained in direct examination (Transcript, page 17, line 10 - 25; page 18, line 1 - 22) and cross examination (Transcript, page 33, lines 14-25, and page 34, page 35, page 36, lines 1 - 25). Copies are attached.

Officer Castleberry testified that he intended to retrieve the purse out of a sense of personal safety and to inspect the purse/area for weapons. Did he have sufficient justification to be concerned? These are the "officer safety" facts:

1. He was alone on patrol and had not yet called for backup.

2. It was late at night; it was very dark and none of the occupants lived in Utah County.

3. The road is located in a remote area of Utah County and Officer Castleberry described it as a "deserted road."

4. There were two vehicles at the site with occupants in each, (three occupants in the subject vehicle and two occupants in the pickup truck which was parked contiguous.)

5. This was an area of frequent criminal activity.

6. His vision was severely restricted because of the darkness and the fact that all of the windows were fogged up.

7. The other vehicle was running and Officer Castleberry testified he believed the subject vehicle had the engine on with a fifteen-year-old unlicensed girl behind the wheel and two other passengers in the back seat.

Ultimately would it have been permissible for Officer Castleberry to shine a flashlight through the passenger window for safety purposes? Yes. Then, since the window was fogged and severely restricted his vision, was he then justified to open the door? It is the opinion of the Court that under these circumstances the Officer was justified in opening the passenger door. When he did so the bindle of drugs was in plain view. Inevitably the drugs may have been discovered even if the defendant had retrieved the purse because the purse did not belong to her and presumably did not contain her license.

The Mirquet ruling clarified factors to be considered by a Court in assessing whether a defendant is in custody for purposes of Miranda.

> The standard for determining when a defendant is "in custody" for Miranda purposes is well settled. The safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. More specifically, Miranda warnings are required whenever the circumstances of an interrogation are such that they exert upon the detained person pressures that sufficiently impair his free

exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

The "not free to leave" standard, on the other hand, determines whether a person has been "seized" under the Fourth Amendment to the United States Constitution. That standard is broader than the Miranda standard. A person may be "seized" for Fourth Amendment purposes but not be "in custody" for Fifth Amendment purposes. Whether one is "in custody" for Miranda purposes depends on an objective assessment of the circumstances of the interrogation with respect to the compulsory nature of the interrogation rather than on the subjective intent or suspicions of the officers conducting the examination.

In the context of a routine traffic stop, the driver and the passengers, even though they have been stopped and, at least momentarily, are not free to leave, are not "in custody" for Miranda purposes. That is true even though an officer engages in some degree of accusatory questioning of the driver during the course of the stop and even though the officer may have a subjective, unstated intent to arrest the driver. . .

To guide the decision as to when one is in custody and entitled to a Miranda warning prior to a formal arrest, Salt Lake City v Carner, 664 P.2d 1168 (Utah 1983), set out four factors to be evaluated: 1) the site of the interrogation; 2) whether the investigation focused on the accused; 3) whether the objective indicia of arrest were present; and 4) the length and form of the interrogation" . . .

In holding that Mirquet was in custody, the Court of Appeals, applying the Carner factors, found that 1) the site of the interrogation was inside the police car; 2) Officer Mangelson's investigation focused solely on defendant; 3) the objective indicia of arrest were present; 4) the form of the interrogation evidenced a clear coercive intent on the part of the officer to prompt Mirquet to produce incriminating contraband; and 5) the place of the interrogation added to the coercive environment.

The facts support both these subordinate conclusions and the ultimate conclusion that the defendant was "in custody." Id at 1146, 47 & 48. (Emphasis added).

ISSUE NO. 2

At what point was the defendant in custody and the subject of an interrogation so as to require the officer to administer Miranda warnings to the defendant?

Both sides rely upon the case of State v. Mirquet, 914 P.2d 1149 (Utah 1996). This Court must apply the law contained in Mirquet to the facts of this case. The scenario of facts presented by the State of Utah in its briefing seems to rely upon the officer's report, which is not in evidence. The Court must rely upon the testimony at the hearing.

Likewise, the defendant relies upon "facts" that are not in evidence, such as "the defendant was not experienced or knowledgeable regarding criminal procedure and the defendant had never been arrested prior to this incident and had no criminal record." These facts are not in evidence. Defense argues that Ms. Brake's "inexperience with the criminal justice system" together with other circumstances mandate that the Miranda warning should have been prior to interrogation.

Defendant further argues that a reasonable person in Miss Brake's shoes (knowledge, experience, and understanding) would believe that they were the subject of a custodial interrogation by Deputy Castleberry. While that might be a correct statement of the law, there is absolutely no testimony or evidence in the case respecting Ms. Brake's knowledge, experience and understanding or her "inexperience with the criminal justice system." She did not testify at the hearing and certainly there is no evidence that Deputy Castleberry knew about or inquired about her past criminal history, past drug use or her knowledge of the criminal justice system or legal procedure. That would not have been permissible.

In the case at bar, Officer Castleberry observed a white plastic bindle on the passenger side front seat immediately after he opened the front door. He picked it up and asked who owned it, to which no one responded. The bindle was next to a purse. When the officer asked who owned the purse, the defendant, Ms. Brake or others, responded that the purse belonged to a young woman in the second vehicle, the white truck. While Castleberry was speaking with this young woman, a backup officer, Deputy Chipman, arrived and Castleberry directed him to search the defendant's vehicle. As Officer Chipman was searching the defendant's vehicle, Castleberry spoke with several individuals including the defendant, Ms. Brake. He checked for signs of

cocaine use in various individuals and testified: "It appeared to me that all of the individuals that I looked at exhibited signs of having used cocaine."

No one was "free to leave" while the officer asked questions. Applying the Mirquet/Carner test the Court finds:

1. The questioning took place at the remote site in Officer Castleberry's patrol vehicle;

2. The investigation focused on all of the individuals in the two vehicles;

3. There was no objective indicia of arrest; no handcuffing, no one being constrained in a vehicle; no formal "you are under arrest" directive. In addition, there was nothing said which attempted to coerce her or prompt her to retrieve incriminating evidence.

4. The investigation was quite short and there was no coercive or accusatory statements.

Accordingly, applying the four-pronged test, the Court does not find that Ms. Brake had been "deprived of her freedom in any significant way" for purposes of Miranda warnings. But once she had admitted "the specific bindle was hers in addition to any cocaine that – the residue that was found within the box. . ." the Miranda was implicated. It was not given at that stage and should have been.

RULING

Defendant's Motion to Suppress is granted in part and denied in part. Counsel for the State of Utah is directed to prepare an order consistent with this ruling.

The Clerk of the Court is instructed to calendar this case in order to set a jury trial.

Dated this 11 day of October, 2000.

BY THE COURT

JUDGE LYNN W. DAVIS

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST COURT UTAH COUNTY